Lembaga Kemajuan Wang Simpanan Pekerja v Rubfil Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–22–699 OF 2003
ABDUL WAHAB SAID AHMAD J
13 JULY 2005

Civil Procedure — Third party proceedings — Notice — Whether there was a question to be tried as to the liability of the third party to make a contribution and indemnity in whole or in part — Claim in employee provident fund arrears — Whether second and third defendants jointly and severally liable

The plaintiff claimed from the defendants, employee provident fund arrears for the period of July 1999 to August 2001, amounting to RM456,933, interest, dividend and costs. The third party was the first defendant's managing director since 11 March 1998. The third defendant, also a director, did not hold any executive post in the first defendant. The second defendant handles the management and the day-to-day administration of the first defendant. This was the third defendant's appeal against the senior assistant registrar's decision dismissing his application for leave to issue third party notice against the second defendant. The third defendant contended that if there was any liability to the Employee Provident Fund ('EPF'), the sole person that should be answerable was the third party, ie, the second defendant.

Held, dismissing the appeal:

(1) The third defendant should have issued the third party notice against the second defendant without necessity of leave of this court. It was then that the second defendant could apply to strike out the third party notice. However, in this case the opposition to the third party notice had been made by opposing the application for leave when none was required. The court treated the affidavit of second defendant properly made to determine on the substantive issue of whether a third party notice should rightfully be issued by third defendant (see para 13).

(2) In the third party application for contribution or indemnity, the third defendant has to show that there is a question to be tried as to the liability of the third party to make a contribution and indemnity in whole or in part. As the liability of second and third defendants were jointly and severally, the issuance of the third party notice was improper. The claim for indemnity from third party was inappropriate based on their joint and several liability to the EPF dues as provided under s 46 of the Employees Provident Fund Act 1991 (see para 12).

[**Bahasa Malaysia summary**

Plaintif menuntut daripada defendan-defendan, sumbangan Wang Simpanan Pekerja tertunggak bagi tempoh Julai 1999 ke Ogos 2001, berjumlah kepada RM456,933, faedah, dividen dan kos. Pihak ketiga adalah pengarah urusan defendan pertama sejak 11 Mac 1998. Defendan ketiga, juga seorang pengarah tidak memegang sebarang jawatan eksekutif dalam defendan pertama. Defendan ketiga menguruskan pengurusan dan pentadbiran seharian defendan pertama. Ini adalah rayuan defendan ketiga terhadap keputusan penolong kanan pendaftar yang menolak permohonannya untuk kebenaran mengeluarkan notis pihak ketiga terhadap defendan kedua. Defendan ketiga menuntut bahawa sekiranya ada liabiliti kepada Kumpulan Wang Simpanan Pekerja('KWSP'), pihak yang bertanggungjawab adalah pihak ketiga, iaitu defendan kedua.

Diputuskan, menolak rayuan itu:

(1) Defendan ketiga sepatutnya mengeluarkan notis pihak ketiga terhadap defendan kedua tanpa kebenaran mahkamah ini. Seterusnya, ia adalah defendan kedua yang boleh memohon untuk menolak notis pihak ketiga itu. Tetapi, dalam kes ini pembangkang kepada notis pihak ketiga telah dibuat dengan membangkang permohonan untuk kebenaran apabila ini tidak perlu dibuat. Mahkamah menganggap afidavit defendan kedua sebagai betul untuk memutuskan isu substantif berhubung dengan sama ada notis pihak ketiga patut dikeluarkan oleh defendan ketiga (lihat perenggan 13).

(2) Dalam permohonan pihak ketiga untuk sumbangan atau indemniti, pihak ketiga telah menunjukkan bahawa ada soalan-soalan yang patut dibicarakan mengenai liabiliti pihak ketiga membuat sumbangan dan indemniti secara keseluruhan atau sebahagian. Oleh kerana liabiliti defendan kedua dan ketiga adalah bersama dan berasingan, pengeluaran notis pihak ketiga adalah tidak sesuai. Tuntutan untuk indemniti daripada notis pihak ketiga adalah tidak sesuai apabila didasarkan atas liabiliti bersama dan berasingan kepada KWSP tertunggak seperti yang diperuntukkan di bawah s 46 Akta KWSP 1991(lihat perenggan 12).]

Notes

For cases on notices of third party proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3380–3382.

Legislation referred to

Companies Act 1965 s 181
Employee Provident Fund Act 1991 s 46
Rules of the High Court 1980 O 18 r 8(1)

TA Sivam (Siva Thurai Mariany & Co) for the second defendant.
Mohd Yaacob (Lainah Yaacob & Zulkepli) for the third defendant/appellant.

Abdul Wahab Said Ahmad J:

[1] Enclosure 26 is the third defendant's appeal against the senior assistant registrar's decision on 22 December 2003 dismissing his application for leave to issue third party notice against the second defendant.

[2] Plaintiff claims from the defendants, Employee Provident Fund ('EPF') arrears for the period of July 1999 to August 2001, amounting to RM456,933, interest, dividend and costs. The third party was the first defendant's managing director since 11 March 1998. The third defendant also a director does not hold any executive post in the first defendant. The said post was held by the third defendant as a representative of Rubpro Sdn Bhd, which holds 16.5% of the shares in the first defendant. The second defendant handles the management and the day to day administration of the first defendant.

[3] The third defendant said that all the management, control and administration of the first defendant were carried out by the second defendant. The second defendant was responsible for the EPF contributions from July 1999 until August 2001, amounting to RM456,933 together with interests and dividends.

[4] To enable the first defendant to pay off its debts, the third defendant had suggested the closing down of the first defendant to the second defendant. The second defendant rejected the suggestion. A settlement was reached between the third defendant and the second defendant. The third defendant agreed to transfer all his interests in Rubpro Sdn Bhd to the second defendant. The third and second defendant eventually agreed that they will have no claims whatsoever in Rubpro Sdn Bhd and the first defendant. It was also mutually agreed that they do not have any claim on each other.

[5] The third defendant said that the third party, ie the second defendant exercises administrative and management powers in the first defendant. The third defendant said since he does not have those powers he could only make suggestions to the third party to do what is best for the first defendant. The second defendant did not heed to his suggestions and the first defendant continued to incur losses. Therefore, if there is any liability to the EPF, the sole person that should be answerable is the third party.

[6] The second defendant in his reply said that the third defendant does play an active role in the corporate governance of the first defendant. The first defendant's board of directors' functions in a democratic manner and all decisions were made by consensus. The second defendant referred to s 46 of the Employee Provident Fund Act 1991 ('the EPF Act') that says that the directors holding the post at the material time is jointly and severally liable for any amount owed to the EPF, regardless of their individual roles, the purpose for which they were appointed and who appointed them. If the third defendant wishes to claim for any indemnity, then he should claim against his principal company.

[7] The third defendant's application is made under O 18 r 8(1) of the Rules of the High Court 1980. In its draft third party notice, the third defendant prayed for the third party to indemnify the third defendant in respect of the EPF claim.

[8] On a perusal of the draft third party notice, the third defendant is claiming an indemnity arising out of the fact that the second defendant is the managing director and in control of the company and his settlement agreement on the transfer of the shares with the second defendant.

[9] The written submission of the third defendant's counsel centered primarily on the fact that he does not have administrative and management control over first defendant. Any liability should according to him be the responsibility of third party.

[10] Third defendant's counsel also submitted that third defendant had divested all the 16.5% shareholding in first defendant to second defendant and one Vijay Lachmander for nominal sum of RM1. In the letter dated 3.7.2001, third defendant and the second defendant mutually agreed that they will have no claim whatsoever in Rubpro Sdn Bhd and the first defendant. Pertinently para 6 of the letter provided that they also mutually agreed that they do not have any claim on each other. I do not see any undertaking by the second defendant to pay for the third defendant's liability to the plaintiff in this suit for third defendant to claim an indemnity by way of this third party notice.

[11] The second defendant's counsel submitted that at the material time the second and third defendant were directors of first defendant. The third defendant could not seek an indemnity from second defendant notwithstanding their differences of opinion in the administration of Rubfil Sdn Bhd. Rubpro could have recourse to a s 181 oppressing petition and other rights of shareholders as provided in the Companies Act 1965. The liability of directors under s 46 of the EPF Act are joint and several as first defendant already under liquidation. The directors, be they as nominees, sleeping directors or non active directors owe a duty to see the company's employees' EPF be protected. As directors of the company whether as active, nominee, sleeping or non active director all of them are jointly and severally liable.

[12] As the liability of second and third defendant are jointly and severally, the issuance of the third party notice is improper. The claim for indemnity from third party is inappropriate based on their joint and several liability to the EPF dues as provided under s 46 of the EPF Act. In this third party application for contribution or indemnity, the third defendant has to show that there is a question to be tried as to the liability of the third party to make a contribution and indemnity in whole or in part.

A **[13]** In this case before me, the third defendant should have issued the third party notice against second defendants without necessity of leave of this court. It is then that the second defendant could apply to strike out the third party notice. However, in this case the opposition to the third party notice had been made by opposing the application for leave when none is required.
B I treated the affidavit of second defendant properly made to determine on the substantive issue of whether a third party notice should rightfully be issued by third defendant.

[14] I am satisfied as the suit against them by EPF is made under s 46 of the EPF Act which stipulate that their liability as directors holding office at
C the material time are jointly and severally, the third party notice should rightfully be refused. I thereby dismissed the appeal by third defendant with costs.

Appeal dismissed.

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Reported by Peter Ling

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